IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

175

No. [redacted]

MONTREAL SECURITIES, INC., *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Carl L. Shipley and Thomas A. Ziebarth, on behalf of Montreal Securities, Inc., a corporation, pray that a writ of certiorari issue to review the decision of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the United States Court of Claims is reported at 329 F. 2d 956, and is set out *infra* in the appendix, page 1a.

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28, U. S. Code, Section 1255.

QUESTION PRESENTED

Whether a purchaser, upon rescission of a contract for the sale of an apartment project owned by the Federal Housing Administration on the ground of mutual mistake of fact and law, is entitled to a refund of the purchase monies paid as a result of such mistake.

STATUTES INVOLVED

Title II of the National Housing Act, Section 207(c)(2), 12 USC § 1713(c)(3), provides in pertinent part:

> "No mortgage shall be accepted for insurance under this section or section 210 unless the Commissioner finds that the property or project, with respect to which the mortgage is executed, is economically sound."

Section 207(1) of the same Title, 12 USC § 1713(1), provides in pertinent part:

> "Notwithstanding any other provision of law relating to the acquisition, handling, or disposal of real or other property by the United States, the Commissioner shall also have the power . . . to . . : sell for cash or credit or lease in his discretion, any property acquired by him under this section."

Section 207(c)(2) of the same Title, 12 USC § 1713(c)(2), provides in pertinent part:

> "To be eligible for insurance under this section a mortgage on any property or project shall involve a principal obligation in an amount . . . . not to exceed 90 per centum of the estimated value of the property or project."

Title IX of the National Housing Act, Section 903(c), 65 Stat. 297; 12 USC § 1750 b (c), provides in pertinent part:

> "... no mortgage shall be accepted for insurance under this subchapter unless the Commissioner finds that the project with respect to which the mortgage is executed is an acceptable risk in view of the needs of national defense."

Section 904(f) of the same Title, 65 Stat. 300; 12 USC § 1750 c (f), provides in pertinent part:

> "Notwithstanding any other provision of law relating to the acquisition, handling, or disposal of real property by the United States, the Commissioner shall have the power to . . . sell for cash or credit, in his discretion, any properties conveyed to him in exchange for debentures and certificates of claim as is provided in this section? . . ."

STATEMENT

In April 1961, the Federal Housing Administration issued a "Prospectus and Invitation to Bid" on two apartment projects located in Williston, North Dakota, known collectively as the Manor Apartments. These properties were originally insured by the FHA under Title IX of the National Housing Act, 65 Stat. 295-302 (1951), as amended, 12 USC Sec. 1750 *et seq.* The FHA subsequently became the owner of the projects through foreclosure.

The "Prospectus and Invitation to Bid" contained a general description of the properties, the minimum acceptable price, ($165,000), the maximum mortgage it would take ($150,000), and the cash deposit required with the bid ($10,000). Also set forth were the rents fixed by the FHA and the percentage of occupancy of each of the apartments for the 12 month period beginning in March 1960 and ending in February 1961. Williston Manor, with 54 rental units, and Northwestern Manor, with 12 rental units,

were represented as having the following percentages of occupancy.

Month	Williston Manor	Northwestern Manor
March 1960	80	—
April 1960	83	—
May 1960	80	92
June 1960	80	83
July 1960	86	92
August 1960	63	83
September 1960	83	83
October 1960	83	91
November 1960	80	100
December 1960	80	100
January 1961	83	92
February 1961	77	86

Petitioner's bid of $170,275 was accepted. A formal contract was entered into on May 8, 1961, which provided that petitioner was to pay $10,000 immediately and the balance of the purchase price ($10,275 in cash and a $150,000 note secured by a mortgage and chattel mortgage) at or prior to closing. The agreement also called for the petitioner (a New York corporation) to take title in the name of a North Dakota corporation to be set up for that purpose. On July 28, 1961, petitioner assigned the contract to Lincoln Apartments, Inc., its wholly-owned subsidiary. On October 25, 1961 the closing took place pursuant to the contract terms and title passed to Lincoln Apartments, Inc., which, in turn, gave the FHA its note secured by a mortgage and chattel mortgage.

Shortly thereafter, occupancy of the two apartments declined to only 25% of capacity. Petitioner was unable to meet even the mortgage payments out of the rental income and on May 21, 1962 it notified the FHA that it rescinded the contract and requested the return of the $20,275 which it had previously paid. On June 20, 1962 the FHA refused to accept the rescission or to return the money.

Petitioner sued in the United States Court of Claims on July 18, 1962 for a return of the purchase price, and in a decision dated March 13, 1964 (Appendix A, *infra*) the Court granted the government's motion for summary judgment and dismissed the complaint.

REASONS FOR GRANTING THE WRIT

1. By its actions the Federal Housing Administration indicated that it believed that it was bound by the standard of "economic soundness" when it made representations in its "prospectus" as to the current rate of occupancy, the projected operating expenses, the minimum purchase price and the maximum loan which it would make on the property. Petitioner believed these representations and in reliance upon its understanding of the Commissioner's duty made a good faith bid. When, as it turned out, that the minimum purchase price and mortgage were palpably *unsound* economically the Commissioner erred in refusing to allow rescission and a refund of the purchase money paid. Based on the information furnished by the FHA, the Manor Apartments presented a reasonably attractive investment opportunity. Quite obviously the Commissioner thought so too and he set the minimum price and maximum mortgage accordingly.

While the law, 12 USC § 1713(d) and § 1750c(f), allows the Commissioner "in his discretion" to sell property which he acquires, this discretion is not unlimited. If he were to sell for an unconscionably low price the courts would undoubtedly set aside the sale as being an abuse of the Commissioner's discretion. The Government should not be unjustly enriched simply because the Commissioner, under the guise of an exercise of his discretion, is able to induce the sale of a housing project by offering credit terms which are economically unsound.

Such indifference on the part of the Commissioner amounts to a lack of good faith, and, as the Court of Claims

pointed out by way of *dicta* in *Alloys & Chemicals Corp. v. U. S.*, 1963, 324 F. 2d 509.

> "This is not to say that allegations short of a positive intent to deceive will never raise a material question of fact on defendant's good faith; for in appropriate circumstances a vendor's indifference to the accuracy of his estimate might conceivably be alleged which is so consummate as to be of identical effect."

2. The decision below is probably not in accord with the decision of this Court in *United States v. Utah, N. & C. Stage Co.*, (1905) 199 U.S. 414, 26 S. Ct. 69, 50 L. Ed. 251. In that case, the Stage company was awarded extra compensation for new and additional services which the Court found not to be within the contemplation of the parties at the time when a contract for the carriage of mails was entered into, despite a contractual agreement that the Postmaster General could order extra service without additional compensation. In the instant case, the abrupt decline in rate of occupancy was not within the contemplation of the parties. Just as the Court would not require a contractor to perform services which were not reasonably within the scope of a contract, it should set aside a contract for the sale of an apartment project, where, as here, the parties were mistaken as to the economic soundness of the project.

3. There is a probable conflict between the decision in the instant case and the decision in *Krupp v. Federal Housing Administration*, (CA-1, 1961) 285 F. 2d 833. In the latter case, the FHA, using the same type of "prospectus" as is here involved, misstated the number of carports which were available in the project. The same disclaimers and invitation to inspect were made a part of that document. Krupp actually *did* inspect. The court held, however, that an invitation to inspect a property will not protect the government in all cases particularly where the nature of the statement is clear.

This case presents an even stronger injustice, for in *Krupp, supra*, an inspection and measurement of the garage spaces would have revealed the patent error in the Government's "prospectus". Here, however, there were positive statements relating to percentage of occupancy, price and mortgage terms which, together, constituted an affirmative representation as to "economic soundness". No ordinary inspection could have revealed any error. Only a comprehensive economic survey of the rental housing market in the Williston, N. D. area could have raised any question as to the validity of the FHA's representations. Yet this is the very kind of expertisse with which the vendor agency is charged by law.

4. Broadly speaking, this case presents the question of whether the Commissioner of the Federal Housing Administration may seek refuge in the doctrine of *caveat emptor* in his dealings with the public when selling property which comes into the agency's possession through foreclosure or otherwise. The Court of Claims, in its decision treated this case as merely "another in the long series of suits by dissatisfied purchasers of Government property".

The responsibility of the Commissioner in disposing of such property is vastly different from that of the heads of other Government agencies selling surplus personal property on a "where is, as is" basis. The Commissioner is, by law, charged with the responsibility of implementing the various Acts of Congress which are designed to promote the expanded availability of housing through the Government's guarantee of loans which are found by the Commissioner to be "economically sound" 12 USC 1713 (c)(3) or, as was the case in certain emergency legislation under which the project here involved was *originally* insured) loans which constituted "an acceptable risk in view of the needs of national defense" 12 USC 1750b(c).[1]

[1] This authority expired on August 1, 1954. 65 Stat. 295 (1951) as amended, 67 Stat. 125 (1953), 42 USC § 1591c.

In order to carry out its statutory duties, the FHA must keep abreast of all market conditions which might affect the value of residential housing, and for this reason, maintains insuring offices in principal cities throughout the country. Thus, the FHA is in a vastly superior position to make a determination of "economic soundness".

According to the "Prospectus and Invitation to Bid" involved in this case the Manor Apartments were constructed in 1954 and 1955 and originally the gross rentals (based on 100% occupancy) totaled $54,144.00. At the time the project was offered for sale by the FHA the rents had been reduced and the then current rental rate (based on 100% occupancy) was said to total $46,290.00. The actual rate of occupancy for the previous 10 or 12 months averaged about 80%. The project was originally insured under Title IX of the National Housing Act, 12 USC 1750b(c) but this Title expired since the emergency housing needs of the Korean War had ended.

Obviously, the reduction in rents reflected some diminution in housing needs in Williston, N. D. However, according to the "Prospectus" occupancy was fairly level at the 80% mark. The FHA indicated that the minimum bid which would be considered responsive was $165,000.00 and that the maximum mortgage was set at $150,000.00. This was clearly in line with the statutory admonition, 12 USC 1713(e)(2) that the principal obligation not exceed "90 per centum of the estimated value of the property or project."

The Commissioner has the authority "to sell for cash or credit . . . in his discretion any property" acquired by or conveyed to him whether under the National Housing Act, 12 USC § 1713(l) or under the Defense Housing Amendment 12 USC § 1750c(f). Petitioner respectfully submits that the Commissioner's exercise of this "discretion" requires that he use the same degree of responsibility in any representation relating to the valuation of property which

he proposes to sell as he would require of the promoters of a project seeking FHA insurance. The only standard in effect now or at the time bids were let is that of "economic soundness".

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 241-62

(Decided March 13, 1964)

MONTREAL SECURITIES, INC. v. THE UNITED STATES

Carl L. Shipley for plaintiff. *Shipley, Akerman & Pickett* of counsel.

William L. Davis, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

Before JONES, *Chief Judge*, WHITAKER, LARAMORE, DURFEE and DAVIS, *Judges*.

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

DAVIS, *Judge*, delivered the opinion of the court:

This is another in the long series of suits by dissatisfied purchasers of surplus Government property. Montreal Securities, Inc. was the successful bidder in a sale by the Federal Housing Administration (FHA) of two rental housing projects. After the closing, many of the tenants moved out of the buildings and it appeared that plaintiff had made a poor bargain. It seeks a restoration of the money it paid for the purchase.

The FHA had insured the mortgages of two rental housing projects known collectively as The Manor Apartments, in Williston, North Dakota under Title IX of the

National Housing Act, 65 Stat. 295-302 (1951), as amended, 12 U.S.C. § 1750 *et seq.* Later, FHA became the owner of the properties through foreclosure. In April 1961, it issued a "Prospectus and Invitation to Bid" advertising the sale of the two projects. The information in this circular included a general description of The Manor Apartments, the minimum price the agency would accept ($165,000), the maximum mortgage it would take ($150,000), and the required cash deposit with the bid ($10,000). Also set forth were the rents fixed by the FHA and the percentage of occupancy of each of the projects for a preceding ten or twelve-month period. Williston Manor, having 54 rental units, was said to have the following percentages of occupancy:

1960	*Percent*	*1961*	*Percent*
March	80	January	83
April	83	February	77
May	80		
June	80		
July	86		
August	63		
September	83		
October	83		
November	80		
December	80		

Northwestern Manor, with only 12 rental units, was shown as having these percentages:

1960	*Percent*	*1961*	*Percent*
May	92	January	92
June	83	February	86
July	92		
August	83		
September	83		
October	91		
November	100		
December	100		

This disclaimer was also a part of the prospectus:

> • • • Information provided herein is all that is to be made available by FHA. While care has been exercised to assure accuracy, all information herein is provided solely for permitting parties to determine whether or not the property is of such a type and general character as might interest them in purchase. Those interested are expected to acquaint themselves with the property and to arrive at their own conclusions as to physical condition, number and occupancy of revenue producing units, and any factors bearing upon valuation of the property.

FHA Makes No Warranty As To the Accuracy of Any Information Furnished

Plaintiff offered a bid of $170,275, which was accepted. The formal contract provided that plaintiff was to pay $10,000 immediately and that the balance of the purchase price ($10,275 in cash and a $150,000 note secured by a mortgage and chattel mortgage) was to be paid at or prior to the closing. The agreement also required that Montreal Securities (a New York corporation) take title in the name of a North Dakota corporation to be set up for that purpose. Accordingly, on July 28, 1961, plaintiff assigned the contract to Lincoln Apartments, Inc., its wholly-owned subsidiary and North Dakota nominee for the taking of title. On October 25, 1961, the sale was consummated in a closing at which title was passed to Lincoln Apartments which, in turn, gave the FHA its note secured by a mortgage and chattel mortgage.

Shortly afterwards, occupancy of the rental facilities declined to only 25% of capacity. A mortgage installment due February 1, 1962, was not paid and none of the succeeding installments was forthcoming. On May 20, 1962, plaintiff notified the FHA that it rescinded the transaction and that it wished the $20,275 which it had paid to be returned.

The agency refused and plaintiff brought this suit.[1] In the meanwhile, the FHA had reacquired the properties by foreclosure of the mortgages.

Plaintiff does not contend that the information in the "Prospectus and Invitation to Bid" was false so far as that material went; plaintiff maintains, rather, that it was misled by the information into concluding that the projects had permanent tenants and that occupancy was constant. But here, as in so many previous cases, the bidder was warned that the selling agency did not warrant the accuracy of any information furnished; he was expressly told that if he was interested he should acquaint himself with the property and arrive at his own conclusions as to "physical condition, number and occupancy of revenue producing units, and any factors bearing upon valuation of the property." In the face of these cautions and disclaimers, the plaintiff could not rely on the inferences it drew from the true information given by the FHA. It had to make and rely on its own judgments. This is the consistent teaching of the decisions dealing with comparable sales by the defendant of property which is surplus to its needs. See, *e.g.*, *Allons & Chems. Corp.* v. *United States*, Ct. Cl., No. 8-62, decided Nov. 15, 1963, 324 F. 2d 509; *American Auto Parts Co., Inc.* v. *United States*, Ct. Cl., No. 120-57, decided June 7, 1963, and cases cited at slip op.

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[1] Defendant has argued that Montreal Securities is not the proper party to bring this suit; it says that Lincoln Apartments should be the plaintiff. The cash consideration actually passed from Montreal Securities and that is all plaintiff asks for in this suit. Moreover, Lincoln Apartments is plaintiff's wholly-owned subsidiary and plaintiff's attorney assured us on oral argument that Montreal Securities was the only interested party. We take that to be an admission by Lincoln Apartments that it has no claim against defendant. For these reasons, and in view of our disposition of the merits of the case, we have not required that Lincoln Apartments be formally joined.

p. 5.[2] The abrupt statement in the prospectus that the FHA would furnish no other information does not take this case outside the general rule. Plaintiff was not barred from speaking to the tenants, studying local business and industrial conditions, or making its own inquiries. The principle that the buyer must look out for himself has been followed, where bidders are cautioned to make their own inspections, even in cases in which inspection was impossible or much more difficult than here. *Allons & Chems. Corp.* v. *United States*, *supra*; *American Auto Parts Co., Inc.* v. *United States*, *supra*; *Star Woolen Co.* v. *United States*, Ct. Cl., No. 54-61, decided Nov. 7, 1962, 309 F. 2d 409; *United States* v. *Hathaway*, 242 F. 2d 897, 900 (C.A. 9, 1957).[3]

Plaintiff's major effort to escape the guillotine of *caveat emptor* is the argument that the FHA, unlike other selling agencies, has been required by Congress to warrant the soundness of property such as The Manor Apartments. The FHA, plaintiff insists, could not insure or accept a mortgage on these projects unless the property met the

[2] This is not a case like *Krupp* v. *Federal Housing Administration*, 285 F. 2d 833 (C.A. 1, 1961), in which the selling agency flatly misstated a positive known fact concerning the property (*i.e.*, the number of garage spaces available). There was no such misstatement here—no misdescription of the property. The *Krupp* opinion, interpreting a prospectus similar to that used in this case, thought that the disclaims were addressed "to additional information which would be useful in predicting the earning potential of the property" (*id.* at 836). That is more nearly our situation.

[3] In any event, we find little in the prospectus which would reasonably cause plaintiff to come to the conclusion it now says it reached. On the contrary, the furnished information indicates that there was a considerable variation in the percentage of occupancy. The figures showed that for a twelve-month period occupancy ranged, for Williston Manor (54 apartments), from 63 to 86%; in February 1961, the last month given, occupancy was 77%. As for Northwestern Manor (12 apartments), the prospectus showed that it ranged in occupancy from 83 to 100%. The variations were enough to put a reasonable bidder on notice to inquire further.

statutory standard of being "economically sound"; plaintiff then says that the same standard governed the sale of the projects after foreclosure, and that it relied on this criterion in bidding on and buying the apartments. Since the purchase turned out to be an unsound investment, it is said that there was either a breach of an implied warranty of economic soundness or a material mistake as to that factor.

There are two main refutations of this contention. The first is that the standard of "economic soundness" never applied to The Manor Apartments. When those projects were built, the FHA insured the original mortgages, not under Title II of the National Housing Act, but under Title IX. This latter title was added to ameliorate the shortage of housing and community facilities made especially severe by the shifting of manpower for defense purposes as a result of the Korean hostilities. H.R. Rep. No. 795, 82d Cong., 1st Sess. (1951). It was "designed to supplement systems of mortgage insurance under other provisions of the National Housing Act in order to assist in providing adequate housing in areas which the President * * * shall have determined to be critical defense housing areas." 65 Stat. 296 (1951), 12 U.S.C. § 1750b. Unlike Title II, which requires that the Commissioner of the Federal Housing Administration make a finding that rental housing of the kind involved here be "economically sound" (12 U.S.C. § 1713e), Title IX, section 903, sets up the far less strict standard that the property be an "acceptable risk in view of the needs of national defense." 65 Stat. 298 (1951), 12 U.S.C. § 1750b(c).[4] There is not the slight-

[4] H.R. Rep. No. 795, *supra*, at 9, points out the standard of "acceptable risk" and adds: "This language would permit the FHA to underwrite projects which might not meet the long-term normal criteria of economic soundness, especially as to location and continued marketability, which are required under the regular FHA program." The report also refers to "this deviation from the economic soundness requirement" and to the fact that projects under the new title would be "admittedly more risky than would be acceptable under a long-term peacetime program of mortgage insurance."

est reason to doubt that the projects complied with this minimal requirement.

The second, and more conclusive, answer is that neither the acceptability level set up by Title II ("economically sound") nor that of Title IX ("acceptable risk in view of the needs of national defense") applies to sales by the FHA of foreclosed property. Those standards are important only where the FHA insures a mortgage in the first instance, not where the agency has acquired the property through foreclosure and then sells it. Entirely different provisions of Title IX and Title II specifically cover the disposal of property by the FHA. While the authority to insure mortgages under Title IX had expired when the two rental housing projects were sold to plaintiff,[5] the remaining portions of that title, relating to foreclosure, disposal of property, etc., remained (and still remain) in force. Section 904(f) of Title IX, 65 Stat. 300 (1951), 12 U.S.C. § 1750c(f), provides in pertinent part:

> Notwithstanding any other provision of law relating to the acquisition, handling, or disposal of real property by the United States, the Commissioner [of the FHA] shall have power to deal with, complete, rent, renovate, modernize, insure, make contracts or establish suitable agencies for the management of, or sell for cash or credit, in his discretion, any properties conveyed to him in exchange for debentures and certificates of claim * * *.

This section grants to the Commissioner very broad powers with respect to the disposal of property. There are no such limiting requirements as plaintiff invokes. It seemed logical to Congress that when property was acquired because of the failure of the owner to meet payments and expenses the FHA should not be hampered by standards of "economic soundness" or "acceptable risk"

[5] The authority to insure mortgages under Title IX (with certain irrelevant exceptions) expired as of August 1, 1954. 65 Stat. 295 (1951), as amended, 67 Stat. 125 (1953), 12 U.S.C. § 1591c.

when it attempted to resell. Where the agency is the seller and it takes a purchase-money mortgage, as here, the statute sets up no such standard: the FHA is simply a vendor having no more obligation, in the main, than would the private seller of realty. And if we assume that section 204 is no longer in effect, then the companion section 207(l) of Title II would be applicable to the multi-family rental housing involved in this case.[6]

The defendant's cross-motion for summary judgment is granted and the plaintiff's motion for summary judgment is denied. The petition is dismissed.

[6] Section 207 reads:

"Notwithstanding any other provisions of law relating to the acquisition, handling, or disposal of real and other property by the United States, the Commissioner shall also have the power, for the protection of the interests of the Housing Fund, • • • to deal with, complete, reconstruct, rent, renovate, modernize, insure, and enter contracts for the management of, or establish suitable agencies for the management of, or sell for cash or credit or lease in his discretion, any property acquired by him • • •."

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 175

MONTREAL SECURITIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is an action by the disappointed buyer of surplus government housing projects. Petitioner sought to rescind its contract with the Federal Housing Administration, the seller, and it mainded the return of the payments it had made toward the purchase price. When the FHA Commissioner refused, petitioner brought suit in the Court of Claims to recover its payments. That court granted summary judgment for the United States (Pet. App. 1a).

The facts are not in dispute and are fully set forth in the opinion below (Pet. App. 1a-4a). Briefly, the

FHA had insured the mortgages of two rental housing projects in Williston, North Dakota, under Title IX of the National Housing Act, 65 Stat. 295-302 (1951), as amended, 12 U.S.C. 1750 *et. seq.* Later, FHA became the owner of the properties through foreclosure. In April 1961, it issued a "Prospectus and Invitation to Bid" advertising the sale of the two projects. The information in this circular included a general description of the buildings, the minimum price the agency would accept, the maximum mortgage it would take and the required cash deposit with the bid. Also set forth were the rents fixed by the FHA and the percentage of occupancy of each of the projects for a preceding ten or twelve-month period, which averaged 80% or better. The following disclaimer was also a part of the prospectus:

> * * * Information provided herein is all that is to be made available by FHA. While care has been exercised to assure accuracy, all information herein is provided solely for permitting parties to determine whether or not the property is of such a type and general character as might interest them in purchase. Those interested are expected to acquaint themselves with the property and to arrive at their own conclusions as to physical condition, number and occupancy of revenue producing units, and any factors bearing upon valuation of the property.
>
> FHA MAKES NO WARRANTY AS TO THE ACCURACY OF ANY INFORMATION FURNISHED. [EMPHASIS IN ORIGINAL]

Petitioner's bid was accepted and on October 25, 1961, the sale was consummated. Shortly afterwards,

occupancy of the rental facilities declined to only 25% of capacity. A mortgage installment due February 1, 1962, was not paid and none of the succeeding installments was forthcoming. On May 20, 1962, plaintiff notified the FHA that it rescinded the transaction and that it wished the $20,275 which it had paid to be returned. The agency refused and plaintiff brought this suit. In the meanwhile, the FHA had reacquired the properties by foreclosure of the mortgages.

Petitioner did not contend that any of the material set out by the FHA in the "Prospectus and Invitation to Bid" was false. Rather, it asserted that implicit in the information there supplied was a material representation and warranty by FHA that the property being offered for sale was an "economically sound" investment, on which it relied. Alternatively, petitioner urged that, under a provision of Title II of the National Housing Act, 12 U.S.C. 1713(e)(3), the Federal Housing Administration was *required* to warrant the investment as "economically sound."

The Court of Claims correctly rejected both contentions. In light of the disclaimer already recited, far from making any representation as to the "economic soundness" of these projects, the Invitation to Bid required petitioner "to make and rely on its own judgments" in this respect. That is of course the usual rule applicable to government property sold "as is," particularly where the buyer is given the opportunity to inspect and investigate before bid. *Maguire & Co.* v. *United States*, 273 U.S. 67; *Mottram* v. *United States*, 271 U.S. 15; *Alloys and Chemicals*

Corporation v. *United States*, 324 F. 2d 509 (Ct. Cls.); *Dadourian Export Corporation* v. *United States*, 291 F.2d 178 (C.A. 2); *United States* v. *Hathaway*, 242 F.2d 897 (C.A. 9); *United States* v. *Silverton*, 200 F.2d 824 (C.A. 1); *American Elastics* v. *United States*, 187 F. 2d 109 (C.A. 2).* Indeed, it is the general rule in commercial transactions. 3 Corbin, *Contracts* (1960 ed.), § 605, pp. 638 *ff.*

The assertion that the National Housing Act required the Commissioner to warrant the "economic soundness" of these projects is likewise baseless. As the court below pointed out, the original mortgages on the projects in question were not insured under Title II of that Act, but rather under Title IX, which does not require a finding by the Commissioner that a rental housing project be economically sound before insuring any mortgage upon it. Under Title IX, such insurance could issue if the property represented "an acceptable risk in view of the needs of national defense," 65 Stat. 298, 12 U.S.C. 1750b(c), a much lesser standard, as the legislative history recited in the court's opinion makes plain (Pet. App. 6a). More-

* There is plainly no conflict, as petitioner suggests (Pet. 6), between the decision of the court below and either *United States* v. *Stage Company*, 199 U.S. 111, or *Kropp* v. *Federal Housing Administration*, 285 F. 2d 835 (C.A. 1); *Stage Company* did not involve an agreement for the purchase and sale of property. Rather, it dealt with a contract for the carriage of mail in which the parties' estimate of additional services to be rendered by the contractor free of charge was grossly wrong. In *Kropp*, the selling agency flatly misstated in its prospectus a positive known fact concerning what the court termed (285 F. 2d at 836) the "fundamental, basic description of the property."

over, the mortgage insurance criteria do not govern sales of foreclosed property. Under 12 U.S.C. 1713(l) and 1750c(f), the FHA Commissioner was given broad discretion with respect to the disposal of property, without any suggestion that he must warrant the soundness of the purchase he is inviting.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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